Petition

81-1240

NO. _____

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IN THE

Supreme Court of the United States

October Term, 1981

SWANSON-DEAN CORPORATION,

Petitioner

v.

SEATTLE DISTRICT COUNCIL OF CARPENTERS,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals for
the Ninth Circuit

PETITION FOR CERTIORARI

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FRAYN PRINTING COMPANY SEATTLE, WASHINGTON

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QUESTION PRESENTED

1. Is the scope of the construction industry proviso found in Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), limited to situations in which there is a common situs relationship between union and nonunion workers at a particular job site, so as to make a provision in a collective bargaining agreement between an employer in the construction industry and a labor organization unenforceable and void under 29 U.S.C. § 158(e) when the collective bargaining agreement prohibits the employer from engaging any subcontractors not having contractual relationships with the labor organization, regardless of the presence or nonpresence of union and nonunion workers at the jobsite alongside one another?

2. Does the construction industry proviso found in Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), create an exemption from the Sherman Antitrust Act, 15 U.S.C. § 1, for secondary boycotts effected through collective bargaining agreements in the construction industry?

PARTIES TO THE PROCEEDINGS BELOW

The petitioner, Swanson-Dean Corporation, and the respondent, Seattle District Council of Carpenters, were the only parties to the United States Court of Appeals for the Ninth Circuit decision subject to this Petition and were the only parties to the United States District Court for the Western District of Washington decision which was appealed to the Court of Appeals.

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DESIGNATION OF CORPORATE RELATIONSHIPS

This is the Designation of Corporate Relationships by petitioner Swanson-Dean Corporation.

1. Swanson-Dean Corporation is not owned by any parent corporation.

2. Swanson-Dean Corporation does not have any ownership interests in any subsidiaries.

3. Swanson-Dean Corporation does not have any corporate affiliates.

Table of Authorities

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Connell Construction Co. v. Plumbers and Steamfitters Local 100, 421 U.S. 616 (1975) ... 4,7,8,9

Pacific Northwest Chapter of Associated Builders and Contractors, Inc. v. National Labor Relations Board, 654 F.2d 1301 (9th Cir. 1981), cert. granted, ___ U.S. ___, Docket No. 80-1808 (October 5, 1981). 5

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Sherman Antitrust Act, 15 U.S.C. § 1 3,5,8

NO. _____

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SWANSON-DEAN CORPORATION,

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SEATTLE DISTRICT COUNCIL OF CARPENTERS,

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On Petition for a Writ of Certiorari
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the Ninth Circuit

PETITION FOR CERTIORARI

Petitioner, Swanson-Dean Corporation, respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on May 26, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported in *Swanson-Dean Corporation v. Seattle District Council of Carpenters*, 646 F.2d 376 (9th Cir. 1981) and is appended hereto as Appendix "A". The judgment for which review is sought is appended hereto as Appendix "B". The order denying petitioner's Petition for Rehearing of the Court of Appeals' opinion is appended hereto as Appendix "C". The orders of the District Court which were appealed to the Court of Appeals are not reported and are appended hereto as Appendix "D" and "E". The arbitration award, a portion of which was adopted by one of the District Court orders, is not reported and is appended hereto as Appendix "F".

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 26, 1981. A Petition for Rehearing was filed on June 10, 1981, and was denied on September 23, 1981. The Supreme Court granted petitioner until January 15, 1982 to file this petition for certiorari. Docket No. A-521. This petition for certiorari was filed with the United States Supreme Court within the extension period granted. The jurisdiction of this Court is pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

National Labor Relations Act

29 U.S.C. § 158, *Unfair Labor Practices:*

> *(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling,*

transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: . . .

Sherman Antitrust Act

15 U.S.C. § 1, *Trusts, etc., in restraint of trade illegal;* . . .

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . .

STATEMENT OF CASE

Petitioner, Swanson-Dean Corporation ("Swanson-Dean"), is an employer within the provisions of the National Labor Relations Act, 29 U.S.C. §152 (2), and is engaged in business in the construction industry. Respondent, Seattle District Council of Carpenters ("Union"), is a labor organization within the provisions of the National Labor Relations Act, 29 U.S.C. § 152 (5), and represents employees (carpenters) who work in the construction industry.

Swanson-Dean develops and constructs improvements both on its own property and on the property of others. When developing its own property, Swanson-

Dean engages directly carpenters to do the carpentry work. These carpenters do not necessarily have contractual relationships with the Union. When developing other persons' property, Swanson-Dean subcontracts virtually all carpentry work to subcontractors, however it does employ carpenters to perform some clean up work after the subcontracted carpentry work is completed. The subcontractors generally have a contractual relationship with the Union. There is virtually no occasion when nonunion carpenters employed by Swanson-Dean come in contact with union employees of subcontractors performing carpentry work at a construction site and there is virtually no occasion when nonunion employees of subcontractors performing carpentry work for Swanson-Dean come into contact with union employees of subcontractors performing carpentry work for Swanson-Dean at a construction site.

In and prior to 1975, Swanson-Dean and the Union were bound to a collective bargaining agreement which provided:

> I. Article XII — SUBCONTRACTING
>
> Section 1. The employer covenants and agrees that all job-site subcontracting employers shall comply with the terms and conditions of this agreement. The employer further covenants and agrees that he will subcontract only to employers who, to the best of his knowledge, are in contractual relationship with the union or will become signatory.

In 1975, after the decision of *Connell Construction Co. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616 (1975), Swanson-Dean advised the Union that they would no longer honor the above Article XII, Section 1, of the collective bargaining agreement.

This resulted in two separate District Court actions between Swanson-Dean and the Union before the United

States District Court for the Western District of Washington (those two cases were consolidated on the appeal to the Court of Appeals for the Ninth Circuit).

In one Case, Swanson-Dean challenged the above clause as being violative of Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), and of the Sherman Antitrust Act, 15 U.S.C. § 1, and that the Union had no right to require arbitration to enforce such clause.

In the other case, the Union sought to enforce an arbitration award which had been obtained through arbitration proceedings which took place over Swanson-Dean's protest. That award required Swanson-Dean to make benefit contributions to the benefit plans in which the Union participated based on the hours of work of persons employed by those subcontractors of Swanson-Dean which did not have contractual relationships with the Union.

In summary judgment proceedings, the District Court held that the provision in question was not violative of Section 8(e) of the National Labor Relations Act, not violative of the Sherman Antitrust Act, was arbitrable and that the arbitration award the Union sought to enforce was valid and enforceable.

Swanson-Dean appealed to the Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the District Court's judgments based upon its decision in *Pacific Northwest Chapter of Associated Builders and Contractors, Inc. v. National Labor Relations Board*, 654 F.2d 1301 (9th Cir. 1981), cert. granted, ___ U.S. ___, Supreme Court Docket No. 80-1808 (October 5, 1981).

Jurisdiction for the United States District Court for the Western District of Washington proceedings was pursuant to the National Labor Relations Act, 29 U.S.C. § 185(a) and (c). Jurisdiction for the United States Court of

Appeals for the Ninth Circuit was pursuant to 28 U.S.C. § 1291.

ARGUMENT FOR GRANTING PETITION

1. *Is the scope of the construction industry proviso found in Section 8(e) of the National Labor Relations Act, 29 U.S.C.* § 158(e), limited to situations in which there is a common situs relationship between union and nonunion workers at a particular job site, so as to make a provision in a collective bargaining agreement between an employer in the construction industry and a labor organization unenforceable and void under 29 U.S.C. § 158(e), when the collective bargaining agrement prohibits the employer from engaging any subcontractors not having contractual relationships with the labor organization, regardless of the presence or nonpresence of union and nonunion workers at the jobsite alongside one another?

The importance of the scope of the construction industry proviso found in Section 8(e) of the National Labor Relations Act as it relates to collective bargaining relationships has been recognized by this Court in its granting review of several cases in the consolidated case on which the Court of Appeals for the Ninth Circuit based its decision in this case:

> *Woelke & Romero Framing, Inc. v. National Labor Relations Board,* Docket No. 80-1798;
>
> *Pacific Northwest Chapter of Associated Builders and Contractors, Inc. v. National Labor Relations Board,* Docket No. 80-1808;
>
> *Oregon-Columbia Chapter, Associated General Contractors of America, Inc. v. National Labor Relations Board,* Docket No. 81-91

The challenge in this case, as well as the aforementioned cases presently before the Court, is the scope

of the construction industry proviso under Sectin 8(e) of the National Labor Relations Act. Precisely, does the construction industry proviso condone "top-down" organization by unions in a collective bargaining relationship with employers in the construction industry where there is no union-nonunion friction at construction sites?

In *Connell Construction Co. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616 (1975), this Court held that an agreement which contained a subcontracting clause (which clauses is the functional equivalent of the clause in question in this case) was not protected by the construction industry proviso found in Section 8(e) of the National Labor Ralations Act, 29 U.S.C. § 158(e). The language of the construction industry proviso was broad enough to cover the fact pattern in *Connell*, however, the Court held that such language was to be "... interpreted in the light of the statutory setting and the circumstances surrounding its enactment." *Id.* at 628. Although the union in that case was not signatory to a collective bargaining agreement with the employer, the Court in reaching its decision made the point that one of the major aims of the amendments to the National Labor Relations Act ("NLRA") (including Section 8(e)) was to prevent "top-down" organization campaigns by unions, *Id.* at 632, and recognized that one of the purposes of the construction industry proviso within Section 8(e) of the NLRA was "... to alleviate the frictions that may arise when union men work continuously alongside nonunion men on the same construction site." *Id.* at 631 [citation omitted]. The Court stated that the construction industry proviso "... extends only to agreements in the context of collective bargaining relationships and, in light of congressional references to the *Denver Building Trades* problem [*NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951)], possibly to common situs relationships on particular job sites as well." *Id.* at 633.

The question which is raised by this petition is whether the scope of the construction industry proviso in Section 8(e) of the NLRA permits unions which have collective bargaining agreements with employers to effect "top-down" organization in the construction industry in situations where there can be no construction site friction between the members of the union working at the site and other nonunion workers who do not work at the site during the same period of time. This Court has not yet decided this issue and has agreed to consider it in Docket No.s 80-1798, 80-1808 and 81-91. Petitioner respectfully submits that this case should be heard concurrently with those cases presently before the Court.

2. *Does the construction industry proviso found in Section 8(e) of the National Labor Relations Act, 29 U.S.C.* § 158(e), create an exemption from the Sherman Antitrust Act, 15 U.S.C. § 1, for secondary boycotts effected through collective bargaining agreements in the construction industry?

This issue is not presently before the Court, but Petitioner respectfully submits that this issue should also be heard by the Court.

The construction industry proviso in Section 8(e) of the NLRA permits agreements between employers and labor organizations in the construction industry which relate "... to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work," 29 U.S.C. § 158(e). In *Connell,* the Supreme Court held that the Sherman Antitrust Act, 15 U.S.C. § 1, applies to such an agreement which designates the union with which subcontractors must have contractual relationship if the designated union is not a party to that agreement and does not represent any of the employers workers, regardless of that language in Section 8(e) of the NLRA. The broad language of the constructing industry proviso in

Section 8(e) of the NLRA was to be ". . . interpreted in light of the statutory setting and the circumstances surrounding its enactment," 421 U.S. at 628. It was clear in making its decision that the Court was considering both "top-down" organization issues and job site friction issues.

The United States District Court in this case ruled that *Connell* created a "limited nonstatutory exemption from antitrust sanctions for some employer-union agreements." Appendix D, page D-2; Appendix E, page E-3. In making that ruling, it relied on the validity of the subcontracting clause before it under the construction industry proviso found in Section 8(e) of the NLRA.

The *Connell* decision did not create such a limited nonstatutory exemption from the antitrust laws and, in fact, left undecided the question of the application of the antitrust laws in the situation where the union with which a subcontractor must have a contractual relationship has a collective bargaining agreement with the employer. If the Court rules that the construction industry proviso in Section 8(e) of the NLRA does not apply to situations in which a collective bargaining agreement is present and in which a provision in that agreement prohibits the hiring of subcontractors who are not in a contractual relationship with the signatory union regardless of the lack of job site friction between union and nonunion workers, then the *Connell* case applies and the clause in question is within the scrutiny of the antitrust laws under *Connell* itself.

CONCLUSION

The Petitioner respectfully requests the Court grant its Petition for Certiorari.

DATED this 28th day of December, 1981.

DIAMOND & SYLVESTER

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Appendix

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SWANSON-DEAN CORPORATION, Plaintiff-Appellant, vs. SEATTLE DISTRICT COUNCIL OF CARPENTERS, Defendant-Appellee	)	No. 77-3891
SEATTLE DISTRICT COUNCIL OF CARPENTERS, Plaintiff-Appellee, vs. SWANSON-DEAN CORPORATION, Defendant-Appellant	)	OPINION No. 77-3892

Decided May 26, 1981

Before SKELTON,* Senior Judge, and GOODWIN and FERGUSON, Circuit Judges.

GOODWIN, Circuit Judge.

Swanson-Dean, a construction contractor, appeals from two orders which had the result of validating a challenged subcontracting clause in a collective bargaining aggrement. We affirm.

In 77-3891, the district court granted the carpenter union's motion for summary judgment. This order dismissed Swanson-Dean's action to enjoin arbitration.

In 77-3892, the district court also granted the carpenter union's motion for summary judgment in the union's action for enforcement of the arbitrator's award. The award required Swanson-Dean to pay trust fund contributions for work subcontracted in violation of the subcontracting clause and enjoined Swanson-Dean from future violations of the subcontracting clause.

On April 9, 1980, we heard argument in this case but deferred submission pending an expected *en banc* decision in a number of consolidated appeals. Those cases were decided by this court *en banc* on April 17, 1981. The decision disposes of the major issues in the present case. *Pacific Northwest Chapter, etc., et al. v. N.L.R.B.*, Nos. 78-3468, 78-3469, 78-3487, 78-3619, 79-7011 (9th Cir. April 17, 1981).

Because we have now held that collective bargaining agreements in the construction industry may lawfully contain clauses which limit employers in their choice of subcontractors to those having agreements with the appropriate unions, there was no substantial defect in the challenged agreement in this case.

It also follows that because the agreement was valid the employer had no defense to the arbitration clause. The case was properly submitted to arbitration and the arbitration award is entitled to enforcement.

Affirmed.

SKELTON, Senior Judge.

*The Honorable Byron G. Skelton, Senior Judge, United States Court of Claims, sitting by designation.

I respectfully dissent for all of the reasons stated by Judges Sneed, Choy, Anderson and Farris in their dissenting opinions in *Pacific Northwest Chapter, etc, et al. v. N.L.R.B.*, Nos. 78-3468, 78-3469, 78-3487, 78-3619, and 79-7011 (9th Cir. April 17, 1981), which I adopt by reference. In addition, it is *my* opinion that the agreement was invalid and consequently the arbitration award should not be enforced. I would reverse the decision of the district court.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SWANSON-DEAN CORPORATION, Plaintiff-Appellant, Cross-Defendant,	)	77-3891 77-3892
vs.	)	
SEATTLE DISTRICT COUNCIL OF CARPENTERS, Defendant-Appellee, Cross-Plaintiff.	)	JUDGMENT DC CV 76-707 77-298 WTM

APPEAL from the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle), and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 26, 1981.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SWANSON-DEAN CORPORATION, Appellant, vs. SEATTLE DISTRICT COUNCIL OF CARPENTERS, Appellee.	)	No. 77-3891 D.C. No C76-707M ORDER
SEATTLE DISTRICT COUNCIL OF CARPENTERS, Appellee, vs. SWANSON-DEAN CORPORATION, Appellant.	)	No. 77-3892 D.C. No. C77-298M

Before: SKELTON*, Senior Judge, and GOODWIN and FERGUSON, Circuit Judges

Appellant's petition for rehearing is denied.

Filed and entered September 23, 1981.

*The Honorable Byron G. Skelton, Senior Judge, United States Court of Claims, sitting by designation.

Appendix D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

SWANSON-DEAN CORPORATION, Plaintiff, vs. SEATTLE DISTRICT COUNCIL OF CARPENTERS, Defendant.	NO. C76-707M ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OF DISMISSAL.

Filed and entered October 6, 1977.

THIS MATTER came on for consideration before the undersigned Judge of the above-entitled Court upon the Motion of the defendant, Seattle District Council of Carpenters, for summary judgment of dismissal pursuant to Rule 56, Federal Rules of Civil Procedure.

The Court, having considered the records and files herein, including but not limited to defendant's memorandum in support of the motion for summary judgment, Plaintiff's memorandum in opposition, the affidavit of Edward Dean, Plaintiff's memorandum on temporary injunction with attachments thereto, and Defendant's brief in opposition to the motion for preliminary injunction, finds that there are no material issues of fact and that the defendant is entitled as a matter of law to summary judgment of dismissal.

This action was commenced by Swanson-Dean Corporation, a residential development and construction company, to block arbitration regarding the interpretation and enforcement of a clause of a collective bargaining agreement between the home-building industry of the states of Washington and northrn Idaho and the United Brotherhood of Carpenters and Joiners of America. On November 16, 1976 the Court denied Plaintiff's motion for a temporary restraining order.

The clause at issue in this case is Article XII of the Agreement, which provides in part:

> Section 1. The Employer covenants and agrees that all job-site subcontracting employers shall comply with the terms and conditions of this Agreement. The Employer further covenants and agrees that he will subcontract work to employers who, to the best of his knowledge, are in contractual relationship with the Union or will become signatory.

It is the position of the plaintiff that this clause violates the antitrust laws and Section 8(e) of the National Labor Relations Act [29 U.S.C. § 158(e)] and is therefore inoperative and void in its entirety.

It is the opinion of the Court that Article XII is not illegal under either the antitrust laws or Section 8(e). A proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires a limited nonstatutory exemption from antitrust sanctions for some union-employer agreements. *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965) and *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). The clause in the Agreement at issue in this case comes within that exemption to the antitrust laws.

Plaintiff's reliance on *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100, supra*, is misplaced. In *Connell*, the Court held by a narrow five to four margin that a subcontracting agreement which was outside the context of a collective bargaining relationship and not restricted to a particular job-site was not exempt from the antitrust laws. The Court pointed out a number of times and with great particularity that within the context of a collective-bargaining relationship, the policies of labor law are weighted more heavily against

the policies of the antitrust laws and that a subcontracting agreement may be lawful. See *Connell Construction Co. supre,* 421 U.S. at 625-26, 627, 633 and 637. *See also Pacific Maritime Association v. Federal Maritime Commission,* 543 F.2d 395, 404 n.21 (D.C. Cir. 1976).

It is the opinion of the Court that the collective bargaining agreement here critically distinguishes this case from *Connell.* The importance of this distinction is clear when Article XII is examined in the context of the broader purposes of the labor agreement between the parties. In particular, Article II, the Recognization provision, provides:

> The Employer recognizes the Union as the sole and exclusive collective bargaining representative for all carpenters, carpenter apprentices and improvers on work covered by this Agreement. The Employer also recognizes the traditional trade jurisdiction of the United Brotherhood and agrees to assign all such work to members of the unit covered by this Agreement.

Article XII is a necessary part of the collective bargaining agreement between the parties because it prevents the employer from evading the terms of the Agreement by merely subcontracting its bargaining unit work out to nonunion subcontractors. *But see California State Council of Carpenters v. Associated General Contractors of California, Inc.,* 404 F. Supp. 1067 (N.D. Cal. 1975).

It is further the opinion of the Court that the subcontracting agreement in this case is lawful under the proviso of Section 8(e) of the National Labor Relations Act. The holding in *Connell Construction Co., supra,* was carefully limited to the situation there at issue in which a union approached a "stranger" contractor and obtained a binding agreement not to deal with nonunion subcontractors. 421 U.S. at 627 and 637. As discussed above, this case is clearly distinguishable because the subcon-

tracting clause here is within the context of a previously negotiated collective bargaining agreement.

Plaintiff's argument that the Section 8(e) proviso is inapplicable because carpenters employed by Swanson-Dean almost never work side-by-side with carpenters supplied by subcontractors is without merit. *Atco Construction Equipment, Inc. v. N.L.R.B.*, 511 F.2d 848 (9th Cir. 1975) involved the limited situation where field repairs were made by nonunion workers after all union workers had quit work for the day. The nonunion workers that the plaintiff could employ but for the subcontracting agreement in this case would be carpenters who would be directly, rather than peripherally, involved with the construction on the same job-site as regularly employed union workers.

Since Article XII is lawful under Section 8(e) and comes within the exemption to the antitrust laws, questions of fact concerning the effect of this agreement on competition are not properly before the Court.

It is the opinion of the Court that all other arguments raised by the plaintiff in opposition to this motion for summary judgment were fully adjudicated by the Court in denying the plaintiff's motion for a temporary restraining order. NOW, THEREFORE,

IT IS ORDERED, ADJUDGED and DECREED that the motion of the defendant, Seattle District Council of Carpenters, for summary judgment of dismissal be and the same is hereby GRANTED.

DATED this 6th day of October 1977.

WALTER T. McGOVERN
Chief United States District Judge

Appendix E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

SEATTLE DISTRICT COUNCIL OF CARPENTERS,	)
Plaintiff,	) NO. C77-298M
vs.	) ORDER GRANTING
SWANSON-DEAN CORPORATION,	) PLAINTIFF'S MO-
Defendant.	) TION FOR SUM-
	) MARY JUDGMENT

Filed and entered October 6, 1977.

THIS MATTER came on for consideration before the undersigned Judge of the above-entitled Court upon motion of the plaintiff, the Seattle District Council of Carpenters, for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure.

The Court, having considered the records and files herein, including but not limited to the memorandum in support of Plaintiff's motion for summary judgment, Defendant's brief in opposition, the affidavits of Herman L. Wacker and Edward Dean and the Complaint and Answer, finds that there is no genuine issue as to any material fact and that Plaintiff is entitled to a judgment as a matter of law.

This is an action to compel the defendant, Swanson-Dean Corporation, to abide by an arbitration award dated February 23, 1977. The parties to this action are parties to a collective bargaining agreement that provides for binding arbitration of certain disputes. The dispute at issue here involves Article XII of the collective bargaining Agreement, which provides:

ARTICLE XII—SUBCONTRACTING

Section 1. The Employer covenants and agrees that all job-site subcontracting employers shall

dismissal in the related action No. C76-707M in which Swanson-Dean challenged the legality of Article XII of the collective bargaining Agreement.

It is the opinion of the Court that Article XII of the collective bargaining agreement comes within the non-statutory exemption to the antitrust laws recognized in *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616 (1975) and is lawful under the construction industry proviso of Section 8(e) of the National Labor Relations Act. These legal defenses to the enforcement of the arbitration award raised by Swanson-Dean in this case were fully adjudicated and rejected in the Court's Order granting Defendant's motion for summary judgment of dismissal in the related cause, No. C76-707M. Swanson-Dean is bound in this case by that Order under the doctrine of *res judicata.*

It is further the opinion of the Court that the dispute between the parties was arbitrable and that Swanson-Dean is bound by the arbitrator's decision. Swanson-Dean quotes from *West Coast Telephone Company v. Local Union No. 77, International Brotherhood of Electrical Workers,* 431 F.2d 1219 (9th Cir. 1970) in support of its contention that this dispute was not arbitrable. However, Swanson-Dean fails to quote the next paragraph of that opinion which states:

> The test to be applied by the Courts in determining arbitrability was stated by the Supreme Court in United Steelworkers of America v. Warrion & Gulf Navigation Co., 363 U.S. 574, 582-583, 80 S. St. 1347, 1353, 4 L. Ed. 2d 1409 (1960):
>
> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation

> comply with the terms and conditions of this Agreement. The Employer further covenants and agrees that he will subcontract work to employers who, to the best of his knowledge, are in contractual relationship with the Union or will become signatory.
>
> Section 2. It is the intent of Article XII, Section 1 to assure the contributions of fringe benefits to the applicable Trust by the subcontractor. The parties mutually agree that the said Article XII is to be interpreted and construed to effectuate this purpose.

In September 1976 the plaintiff demanded arbitration before the American Arbitration Association alleging that Swanson-Dean had violated Article XII by subcontracting carpentry work on Swanson-Dean job sites to non-union subcontractors. The remedy sought through the arbitration was payment to the Carpenters Trusts for work performed by subcontractors.

Once the arbitration was commenced, the defendant here instituted a related action in this Court entitled *Swanson-Dean Corporation v. Seattle District Council of Carpenters,* No. C76-707M, in which it sought to stay the arbitration proceedings on the grounds that Article XII violated the antitrust laws and Section 8(e) of the National Labor Relations Act. By order dated November 16, 1976, this Court denied Swanson-Dean's motion in that case for a temporary restraining order.

The dispute then went to arbitration over the protest of Swanson-Dean. The arbitrator found, in a thorough and well-reasoned opinion, that the dispute was arbitrable and that the Union was entitled to the relief sought. The Union commenced this action when Swanson-Dean refused to comply with the arbitration award.

By an order handed down today, this Court granted the motion of the Union for summary judgment of

> that covers the asserted dispute. Doubts should be resolved in favor of coverage."

This Court has no doubt that when the proper test is applied, this dispute is arbitrable.

The arbitrator carefully considered whether this dispute was arbitrable within the terms of the collective bargaining Agreement between the parties. Because the Court believes that the arbitrability of the dispute involves interpretation of the Agreement, especially the effect of the no-strike provision of Article IX, the Court will not vacate the arbitrator's determination. *United Steel Workers v. Enterprise Corp.*, 363 U.S. 593, 4 L. Ed.2d 1424 (1960) and *San Francisco-Oakland Newspaper Guild v. Tribune Publishing Co.*, 407 F.2d 1327 (9th Cir. 1966). Instead, the Court adopts the well-considered opinion of the arbitrator on the issue of arbitrability as its own opinion.

Since the dispute was arbitrable, Swanson-Dean is bound by the arbitrator's determination under the provision of Article X of the collective bargaining Agreement, and the plaintiff is entitled to summary judgment in this action.

Nevertheless, it is the opinion of the Court that the parties should be given an opportunity to carry out the arbitration award on their own without the Court's supervision. The heart of this case and cause number C76-707M was a determination of the validity of the subcontractor clause of the collective bargaining agreement. That question has now been answered, and there is no reason why the parties cannot now proceed to carry out the arbitration award.

For the reasons stated above, the Court denies at this time Plaintiff's prayer for the appointment of the arbitrator as a special master to supervise enforcement of the award and determination of the amount due the plaintiff

and for judgment in the amount found due by such master as well as costs and attorney's fees.

The Court retains jurisdiction over this action for the purpose of later appointing a special master if the parties cannot proceed with the arbitration award. The Court will entertain a stipulation of dismissal by the parties as soon as the arbitration award is carried out. NOW, THEREFORE,

IT IS ORDERED, ADJUDGED and DECREED that the motion of the plaintiff, Seattle District Council of Carpenters, for summary judgment be and the same is hereby GRANTED.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the defendant, Swanson-Dean Corporation, comply with the arbitration award in all respects.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the motion of the plaintiff for appointment of a special master and award of judgment be and the same hereby is continued subject to call pending an attempt by the parties to comply with the arbitration award.

DATED this 6th day of October 1977.

WALTER T. McGOVERN
Chief United States District Judge

Appendix F

BEFORE THE
AMERICAN ARBITRATION ASSOCIATION

PAUL D. JACKSON
ARBITRATOR

IN THE MATTER OF THE ARBITRATION Between	)	
SEATTLE DISTRICT COUNCIL OF CARPENTERS	)	CASE NO. 75 30 0099 76
and	)	OPINION AND AWARD
SWANSON-DEAN CORPORATION	)	

Decided February 23, 1977.

APPEARANCES:

For the Council:
Herman L. Wacker, Esq.
Vance, Davies, Roberts, Reid & Anderson
Attorneys at Law

For the Employer:
Lyle L. Iversen, Esq.
Lycette, Diamond & Sylvester,
Attorneys at Law

BACKGROUND

The parties are covered by a multi-employer-union collective bargaining agrement requiring arbitration of grievances involving questions of "interpretation." On September 8, 1976 the union submitted a Demand for Arbitration wherein the nature of the dispute was defined as:

> "Violation of Article XII, Sections One and two-Subcontracting, and Article XV, Schedule A, Fringes, Section One, of the current home building agreement of Western Washington."

For remedy, the union asked that the employer be required to make payment to the "Carpenters Trust for work performed by subcontractors."

The employer resisted arbitration on several grounds. It commenced a proceeding in U.S. District Court to have Article XII — Subcontracting, declared illegal and void and sought a temporary injunction enjoining arbitration. The court, after being fully briefed, denied the injunction without opinion but reserved trial on the merits. Thereafter, the parties proceeded to arbitration. In the course of the hearing they entered into the following Stipulation:

"1. This dispute arises under the 'Agreement Between the United Brotherhood of Carpenters and Joiners of America'. —Jt. Ex. #1

"It is stipulated:

"2. That Swanson-Dean Corporation, member of the Seattle Master Builders Association, a multi-employer bargaining unit with delegated bargaining rights, is bound by Jt. Ex. #1.;

"3. That the Seattle District Council of Carpenters is bound by the agreement;

"4. That Swanson-Dean Corporation did not in all cases comply with Article XII, Section I of the agreement in that it sub-contracted with employers

who failed to comply with the terms and conditions of Jt. Ex. #1, and who to the best of Swanson-Dean Corporation's knowledge, may not have been in contractual relationship with the Union and did not become signatory.

"5. Swanson-Dean Corporation did not contribute to the trust funds set forth in Article XV, Section I on behalf of employees employed by the non-complying subcontractors referred to above."

"Issues submitted to the arbitrator are:

"1. Whether the contract provides for arbitration of any issue regarding failure of the employer to make fringe payments.

"2. If the answer to #1 is 'yes', what does the contract, specifically Article XII, mean with regard to these facts?

"3. If the answer to #1 is 'yes', what should be the remedy?

"The arbitrator shall retain jurisdiction for the purposes of enforcement of his award.

"Other Joint Exhibits: Revised Trust Agreement of Carpenter Health and Security Trust of Western Washington - Jt. Ex. #2

"Signed for Employer — Signed for Union

/s/ Lyle L. Iverson — /s/ Herman Wacker

Lyle L. Iverson — Herman Wacker

"Accepted January 17, 1977"
Paul D. Jackson
Arbitrator 1/17/77"

PERTINENT CONTRACT PROVISIONS

"ARTICLE IX — NO STRIKES — NO LOCKOUTS

"(A) It is mutually agreed there shall be no authorized strikes, lockouts, or other slow down or cessation of work by either party on account of any labor differences pending the full utilization of grievance machinery set up in Article XI; provided that employees covered by this Agreement shall not be expected to pass through a duly authorized picket line.

"(B) Failure of an employer to make wage, or other negotiated fringe payments as outlined in this Agreement is a violation of this Agreement and not subject to Grievance Procedure as outlined in Article X.

"ARTICLE X — SETTLEMENT OF DISPUTES & GRIEVANCES

"Section 1. In the event that a dispute or grievance over the interpretation of this Agreement (other than jurisdictional) occurs the following procedure shall be followed.

"ARTICLE XII — SUBCONTRACTING

"Section 1. The Employer covenants and agrees that all job-site subcontracting employers shall comply with the terms and conditions of this Agreement. The Employer further covenants and agrees that he will subcontract work to employers who, to the best of his knowledge, are in contractual relationship with the Union or will become signatory.

"Section 2. It is the intent of Acticle XII, Section 1 to assure the contributions of fringe benefits to the applicable Trust by the subcontractor. The parties mutually agree that the said Article XII is to be interpreted and construed to effectuate this purpose."

ARTICLE XIII —
INVALIDITY AND SERVERABILITY

"It is the intention of the parties hereto comply fully with the provisions of the Labor Management Relations Act, as amended, and with all other applicable statutes and regulations, and in the event that any provision of language of this Agreement is held to be unlawful, then such provision or provisions shall become immediately inoperative and void in its entirety; the parties hereto agree to immediately meet to negotiate legally acceptable substitute provisions for such voided provisions. All other parts, portions, provisions and remainder of the Agreement shall continue in full force and effect for the duration of the Agreement.

"ARTICLE XV

"FRINGES:

"Section 1. The Employer signatory hereto agrees to make contributions to the applicable Health & Security Trust Fund, the Pension Trust Fund, Journeyman and Apprenticeship Trust Fund, Vacation Trust Fund, as specified, in the negotiated contract with the Associated General Contractors, and does further agree to abide by all of the terms and conditions of the Trust Agreements, creating the Trust Funds, and any negotiated Amendments heretofore or hereafter adopted. Further, the Employer does accept as its lawful representative the employer trustees who are now or may hereafter serve on the Board of Trustees of the respective Trust Funds. The Trust Agreement as amended shall be attached to an become a part of this Agreement. The amount of the Industry Fund will be determined by the appropriate signator employers associations.

"In the Western and Central Washington areas, the

appropriate fringe benefits will be paid to the Carpenters Health and Security Trust of Western Washington.

"The Eastern Washington and Northern Idaho appropriate fringe benefits will be paid into the Washington-Idaho Carpenters-Employers Trust Funds."

DISCUSSION

ISSUE NO. 1:

Article IX (B) provides that failure of an employer to make fringe benefit payments is a contract violation not subject to arbitration. This case is not one, however, wherein the employer has failed to make payment of a negotiated fringe as required by Article XV of the Agreement. In fact, the employer admittedly has made such payments as are required of it with regard to its employees. What is involved here is an effort by the union to impose upon the employer an arbitrator's award that it make payments to the trust funds in lieu of the payments that should have been made by subcontractors of the employer under Article XII. Such requirement would be a possible remedy for breach of the Agreement by the employer. Article IX, however, covers a situation wherein there is a simple breach by a signatory general contractor, of its obligation to pay fixed and readily ascertainable wages or fringe payments — a matter which requires mathematical calculation only, as in the case of "liquidated damages." It does not cover a situation wherein the alleged obligation to pay damages in the form of benefit payments is challenged on various legal or factual grounds, based on opposing interpretations of the Agreement. Where such differences exist, there is need for resort to the greievance and arbitration provision to resolve the differences. In the case of simple breach and failure to make readily ascertainable payments, to avoid the need to resort to a useless, time-consuming step and to

permit immediate court action to collect (a step which would not be possible at law where there is the requirement first, to exhaust grievance and arbitration), the parties have wisely deleted arbitration which is pertinent to other disputes under the contract. The nature of the problem which the parties sought to meet by this exception to arbitration is more fully understood when consideration is given to the peculiar economic history of the building industry, and particularly the large numbers of small contractors, the ease with which the industry can be entered with little or no capital, and the consequent large numbers of insolvencies which frequently have created problems for employees and unions in the collection of wages and fringe benefit payments. In short, the need was for a rapid method for collection of defaulted wages and benefits, without the impediment of having first to pursue grievance procedures.

Accordingly, in the sense that the issue is discussed above, the contract does provide for arbitration in this case. In so holding, however, it is not meant that this answers the question whether arbitration is mandatory in the face of a contention by one party that the matter is not arbitrable because of illegality, public policy or some other reason.

The employer contends that the dispute herein is not arbitrable because of the purported illegality of the subcontracting clause, the subject of the dispute, under the antitrust laws of the U.S., and issue which must be determined by a court of law; moreover, having raised the general question of jurisdiction of the arbitral forum, it contends that this also is an issue which must be decided in court first.

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543.

Hanford Guard Union v. General Electric Co., 57 Wn (2) 491. Particularly, where a question of legality of

the contract under antitrust laws is raised, is the question of arbitrability a judicial one.

Allied Van Lines, Inc. v. Hollander Express & V. Co., 315 NYS (2) 162, 165

City Trade and Industries, Ltd. v. New Central Jute Mills Co., 250 NE (2) 52, 56

Metro-Goldwyn-Mayer Distributing Corp v. John P. Kiggins, 184 Wn. 497.

These same contentions were raised by the employer in the U.S. District Court which refused to enjoin this arbitration. The parties having submitted various questions at issue to arbitration by stipulation, we conceive that the issue of arbitrability of those questions, is not involved herein. The case is still in court, not having been dismissed on the merits. The effect of this opinion and Award and the weight that will be given them are matters for the court to resolve ultimately. The court may intend to use the Opinion and Award of the arbitrator in this case as it would that of a Special Master's Report; but whatever may be the intentions of the court in this regard, we shall proceed with the issues presented and contentions raised as we would in any other case.

ISSUE NO. 2

The fundamental question raised by the employer is the legality of Article XII. It contends that this article is in violation of the federal antitrust laws in that it gives the union "a veto over who may engage in the subcontracting of work for the home building industry," and that the first proviso in Section 8(e) of the National Labor Relations Act does not save this provision of the contract. *Connell Construction Company, Inc. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 426 (1975).

The *Connell* case is a recent decision of the United States Supreme Court on the subject of the legality of

construction industry subcontracting clauses. It is a strongly hedged decision based on narrowly defined facts which are distinguishable from those in the present case - distinctions which, in our opinion, are crucial. Most important of all, the contract which was there held to be in violation of the antitrust laws, was found to be "Outside the context of a collective bargaining relationship." Moreover, it was held that contract was not "restricted to a particular jobsite." Such a contract, according to the court "may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions."

In the present case, the clause which is challenged by the employer as to legality, is clearly within the context of a collective bargaining relationship; indeed, it is part of a collective bargaining contract covering wages and working conditions for the employees of the contracting contractor. In *Connell*, the employer specifically argued against the application of the first proviso to Section 8(e) of the NLRA which authorizes secondary objective contracts in the construction industry on the grounds that Congress intended only to allow subcontracting agreements within the context of a collective bargaining relationship and did not intend to permit "stranger" contracts.

This argument the court accepted. It is an argument inapplicable to our case, for we do not have a "stranger" contract here as was found to be the case in *Connell*.

Furthermore, the court found the the agreement in *Connell* was not limited as to jobsite and therfore prohibited. In the instant case, we construe Article XII not to come into effect until the employer is working on a jobsite and is involved with specific jobsite subcontractors, and only those subcontractors actually working are affected

by the clause. This, then, is clearly not a situation where the union is "seeking subcontracting agreements at large from any general contractor vulnerable to picketing" *(Connell,* 421 U.S. 634). Accordingly, we find that Article XII is not an illegal subcontracting clause under the federal antitrust laws as construed by the United States Supreme Court in its latest case on this subject.

The employer, however, urges that the clause is unenforecable because it requires the doing of an illegal act, to-wit: payment of funds by the contractor to the trusts on behalf of non-contractual employees of the subcontractor, thereby violating the express prohibitions of Section 302 of the *NLRA. Moglia v. Geoghegan,* 103 Fed. (2) 110 (1968); cert. den. 394 U.S. 919.

Article XII does not state that the payments to the trust funds by the subcontractor are for the benefit of its employees, nor does it require the employer to make these payments in lieu of the subcontractor, for the benefit of the latter's employees, although this is a possible, albeit impermissible, interpretation. In fact, the precise obligation of the employer in case of failure to comply by the subcontractor, is not defined. In such case, we will not construe the provision to require an illegal act if it is susceptible of a legal connotation. The present United States Supreme Court decision of *Walsh v. Schlecht,* 94 LRRM 2272 (1977), involving interpretation of a similar provision finds the hours worked by subcontractor employees merely to be the measure of contributions to the trust funds by the subcontractor, the benefits still accruing to the employees of contracted employers. This case justifies an identical interpretation where the clause is even more ambiguous than in *Walsh,* and more easily susceptible to a lawful construction.

ISSUE NO. 3

The Union has demanded as a remedy in this case that the employer be required to make the payments into

the trust funds that should have been made but were not, by the subcontractors. This relief, contends the employer, would be itself unlawful on the grounds that it amounts to exemplary or punitive damages, the union not having shown damage in such amount by the default of the subcontractors. Furthermore, the damage, if any, by virtue of the breach, is to the trusts which did not receive the payments from the subcontractors, and as the trusts are not parties to this arbitration, relief cannot be granted to them. If they have been damaged, they will have to bring suit in court.

The union, for its part, contends that it is a proper party to enforce contract obligations pertaining to trust fund payments for the benefit of its members. *Local No. 90, Stove Mounters International Union v Welbilt Corp.*, 178 F. Supp. 408; aff. 283 F(2) 868; *United Construction Workers v. Electro Chemical Engraving Co.*, 175 F. Supp. In these cases the courts obliged the contracted employer, on suit brought by the union, to make payments into trust funds for welfare and pensions without joining the trusts. We agree that the union can ask for arbitral remedy which protects the interests of its members in the various trusts although the trusts are not parties to the arbitration. In this regard, namely, the form of remedy, the arbitrator's authoity is broader than a court's.

The remedy that is most suitable and equitable is that which was in the contemplation of the parties. Section 2 of Article XII states that "It is the intent . . . *to assure* the contribution of fringe benefits to the applicable trust by the subcontractor. The parties mutually agree that the said Article XII is to be interpreted and construed to effectuate this purpose." In Section 1 the employer "covenants and agrees" that subcontractors shall comply with the provisions of the agreement relating to contributions of fringe benefits to the applicable trusts. The language accepted by the employer is analogous to that

used in guarantor agreements, or agreements of indemnification, and it is our conclusion that the parties intended that the employer would pay if the subcontractor did not.

The language of Article XII places the burden on the employer to show mitigation by proving that "to the best of his knowledge" the subcontractor was in contractual relationship with the union, or promised to become so. The employer did not undertake the burden. We must assume, therefore, that it knew that the subcontractor *was not or would not* become signatory to an agreement with the union. The breach then is an intentional one. Moreover, it was in the power of the employer not to be placed in a position of breach, either by using known, signatory subcontractors, or by inserting in its subcontracts the requirement that the subcontractor become signatory to an agreement with the union. It did not do either one of these things. Under these circumstances, an intentional failure to comply with the agreement must be concluded. Nothing appears to warrant dilution of the liability of the employer for the breach unless it be extreme and unexpected onerousness of the remedy. No testimony was elicited as to the number of noncomplying subcontractors, their employees, hours worked, nor the approximate amount of money that may be required to be paid should the employer be ordered to make full payment. We are loath to grant a monetary award without having knowledge of these things.

Accordingly, having in mind that we retain jurisdiction over this matter by stipulation of the parties, we make the following

AWARD

1. The employer shall provide a complete accounting of all work performed by non-contracted subcontractors and their employees, providing the amount of hours carpentry work was performed, within 10 days of this award.

2. The union shall, upon receipt of the information supplied by the employer, with the assistance of the employer, calculate the amounts believed by it to have been payable by the subcontractors under Article XII, to each trust fund, and shall supply such information to the arbitrator within 10 days thereafter.

3. Thirty days from the date of this award, each side shall submit in writing any facts or arguments it may have why the full amount of payments due the trust funds from the subcontractors, as under 2. above, should or should not be paid by the employer.

4. The employer is enjoined to comply hereafter with the requirements of Article XII.

Date: February 23, 1977

_____

Paul D. Jackson
Arbitrator

Opposition

Office - Supreme Court, U.S.
FILED
MAR 19 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1240

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

SWANSON-DEAN CORPORATION,
Petitioner,

v.

SEATTLE DISTRICT COUNCIL OF CARPENTERS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO PETITION FOR CERTIORARI

DAVIES, ROBERTS, REID,
ANDERSON & WACKER
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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO PETITION FOR CERTIORARI

ADDITIONAL STATUTES INVOLVED

National Labor Relations Act

29 USC § 185(c), Jurisdiction

> For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

COUNTERSTATEMENT OF CASE

There are additions to the statement of case as set forth by the petitioner, Swanson-Dean Corporation, necessary to a decision on the petitioner's petition for writ of certiorari. In support of the counterstatement of the case, appendices to this opposition brief contain the pleadings in the two cases commenced in the United States District Court for the Western District of Washington, which form the basis for the appeal to the Ninth Circuit Court of Appeals. The complaint in Swanson-Dean Corporation v. Seattle District Council of Carpenters, C76-707M, is appended hereto as Appendix A. The answer of the defendant, Seattle District Council of Carpenters in Swanson-Dean Corporation v. Seattle District Council of Carpenters, C76-707M, is appended hereto as Appendix B. The complaint in Seattle District Council

of Carpenters v. Swanson-Dean, C77-298M, is appended hereto as Appendix C and the answer of defendant Swanson-Dean in Seattle District Council of Carpenters v. Swanson-Dean, C77-298M, is appended hereto as Appendix D.

The complaint in Swanson-Dean Corporation v. Seattle District Council of Carpenters was not a suit for damages or an injunction under the anti-trust laws. The suit was a response to a demand by the Union to arbitrate under the collective bargaining agreement the failure of the Employer to comply with the subcontracting provision of the collective bargaining agreement. The Employer alleged in its complaint that the clause was invalid under the Supreme Court's decision in Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 95 S. Ct. 1830 (1975). Based on that alleged illegality, the Employer sought a

declaration of the clause's unenforceability and a stay of arbitration proceedings. The case was initiated in state court and removed by the Union to the United States District Court for the Western District of Washington as a case which stated a claim under 29 USC § 185(a).

After the court refused to stay the arbitration proceeding the arbitration commenced and the Union largely prevailed, with the Employer being ordered to comply with the subcontracting clause of the collective bargaining agreement. The Employer refused to comply with the arbitrator's award and the Union then sued to enforce in Seattle District Council of Carpenters v. Swanson-Dean Corporation. The complaint, Appendix C, stated an action under 29 USC § 185 for breach of collective bargaining agreement in refusing to comply with an arbitration award rendered under such collective bargaining agreement. In

the answer of Swanson-Dean, it was alleged that the agreement violated the anti-trust laws and was void and unenforceable. However, there was no counterclaim for damages, nor any cause of action stated under the Sherman Anti-Trust Act. The answer merely put to issue the question of whether the subcontractors clause was unenforceable due to illegality.

As is revealed from the Ninth Circuit's opinion, in determining to affirm the opinions of the district court enforcing the arbitrator's award, the Ninth Circuit relied in toto on the en banc decision of the same court in Pacific Northwest Chapter v. NLRB, 654 F.2d 1301 (9th Cir. 1981), cert. denied October 5, 1981, see 102 S. Ct. 90. The circuit court specifically stated:

> On April 9, 1980, we heard argument in this case but deferred submission pending an expected en banc decision in a number of consolidated appeals. Those cases were

> decided by this court en banc on April 17, 1981. The decision disposes of the major issues in the present case. Pacific Northwest Chapter, etc., et al. v. N.L.R.B., Nos. 78-3468, 78-3469, 78-3487, 78-3619, 79-7011 (9th Cir. April 17, 1981).
>
> Because we have now held that collective bargaining agreements in the construction industry may lawfully contain clauses which limit employers in their choice of appropriate unions, there was no substantial defect in the challenged agreement in this case.

Appendix A to petition for certiorari.

ARGUMENT

A Petition for Certiorari in This Case, if Granted, Should be Limited to the Question of the Scope of the Proviso to 8(e) of the National Labor Relations Act, 29 USC § 158(e)

In affirming the district court in this case, the Ninth Circuit's complete reliance on its own opinion in Pacific Northwest Chapter indicates there would appear to be little to distinguish this petition from that granted by the Supreme

Court in Pacific Northwest Chapter. However, this petition also raises a question not before the court and one which the respondent believes cannot properly be raised on the petition for writ of certiorari, namely, whether or not the subcontractors clause at issue constitutes a violation of the Sherman Anti-Trust Act. This was addressed in the second argument in support of petitioner's petition for certiorari.

Keeping in mind that this action was essentially one for breach of contract where Swanson-Dean raised illegality of the contract as a defense helps put the issue of anti-trust violations in context. It is clear from the nature of the clause at issue in this case and the Ninth Circuit Court of Appeals' en banc as well as panel opinion in Pacific Northwest Chapter of Associated Builders and Contractors v.

National Labor Relations Board, 654 F.2d 1301, that the court viewed the determinative issue in this case as being whether or not the subcontractors clause the Union seeks to enforce was enforceable under section 8(e) of the National Labor Relations Act. It would appear clear that the clause is one which is either protected or prohibited by that section of the Act. If prohibited, it follows naturally that it would be unenforceable by a district court sitting under its jurisdiction under 29 USC § 185. If, on the other hand, the clause is valid under section 8(e), not even the petitioner argues that it can at the same time be violative of the Sherman Anti-Trust Act.

Thus it appears that embarking into litigation over the scope of the Sherman Anti-Trust Act for clauses which are prohibited by 8(e) is unnecessary and unwarranted in light of this record. The

petitioner has no right or interest in a litigation which is dependent upon a finding of an anti-trust violation. Its sole interest, defense of the breach of contract action, would be served by a finding that the clause is prohibited under section 8(e) of the National Labor Relations Act. Thus the request for the court to entertain as an issue on the petition for writ of certiorari the question of whether or not the clause also violates the Sherman Anti-Trust Act in addition to violating section 8(e) would interject the court in a theoretical or advisory opinion as opposed to an actual case or controversy, because the Employer has not sought damages for a violation of the Sherman Anti-Trust Act or any other relief dependent on finding an anti-trust violation.

It appears, at least inferentially from the petitioner's argument at page 9 of the petition for certiorari, that

the petitioner intends to argue on the merits that any clause not protected by the section 8(e) proviso may or does constitute a violation of the Sherman Anti-Trust Act. In light of the fact such an opinion would not further the resolution of this specific litigation and was not at all addressed by the Ninth Circuit Court of Appeals in its opinion because it was unnecessary to do so, the court should limit any grant of certiorari based upon its earlier grants of certiorari in Pacific Northwest Chapter and related cases to the issue in those cases, namely the scope of the construction industry proviso to section 8(e) of the National Labor Relations Act with respect to situations

where union and nonunion workers are not contemporaneously present on a job site.

Respectfully submitted this 19th day of March, 1982.

DAVIES, ROBERTS, REID
ANDERSON & WACKER

HERMAN L. WACKER
Counsel for Respondent

Appendix

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR KING COUNTY

SWANSON-DEAN CORPORATION, Plaintiff,	)	
	)	NO. 81 8555
vs.	)	
	)	COMPLAINT
SEATTLE DISTRICT COUNCIL OF CARPENTERS, Defendant.	)	

The plaintiff alleges:

I

Plaintiff is and all times material hereto was a corporation and has complied with all relevant laws relative to license fees in the State of Washington and Contractor's Registration.

II

Defendant is a labor organization.

III

A Collective Bargaining Agreement exists between United Brotherhood of Carpenters and Joiners of America and the homebuilding industry. Defendant is a part of United Brotherhood of Carpenters and

Joiners of America and plaintiff is a part of the homebuilding industry, and both parties are subject to that agreement.

IV

Said agreement contains an article designated XII, Section 1. of which reads:

> "The Employer covenants and agrees that all jobsite subcontracting employers shall comply with the terms and conditions of this Agreement. The Employer further covenants and agrees that he will subcontract work to employers who, to the best of his knowledge, are in contractual relationship with the Union or will become signatory."

The agreement also contains Article XIII, which reads as follows:

> "INVALIDITY AND SEVERABILITY
>
> It is the intention of the parties hereto to comply fully with the provisions of the Labor Management Relations Act, as amended, and with all other applicable statutes and regulations, and in the event that any provision of language of this Agreement is held to be unlawful, then such provision or provisions shall become immediately inoperative and void in its entirety; the parties hereto agree to immediately meet to negotiate legally acceptable substitute provisions for such

> voided provisions. All other parts, portions, provisions and remainder of the Agreement shall continue in full force and effect for the duration of the Agreement."

Article XII violates the Federal Anti Trust Laws under a decision of the United States Supreme Court in the case of Connell Construction Company, Inc. vs. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 95 S. Ct. 1830, and under Article XIII it has become inoperative and void in its entirety. It is no longer a part of the contract.

V

On or about the 4th day of August, 1976, United Brotherhood of Carpenters and Joiners of America in consideration for a contemporaneous agreement as to wages, entered into an agreement with the home-building industry as follows:

> "It is agreed that both parties will immediately begin negotiating a substitute subcontractor clause Article XII."

Negotiations are under way to carry out that agreement.

VI

On or about the 10th day of September, 1976, defendant purporting to act under Article X of the agreement, Section 1 (B), filed with the American Arbitration Association a demand for arbitration specifying as to the nature of the dispute: "Violation of Article XII, Section 1 and 2 -- subcontracting, and Article XV, Schedule A, Fringes, Section 1 of the current home-building agreement of Western Washington."

VII

The only agreement affecting the parties with respect to arbitration is Article X, which reads in its pertinent part as follows:

> "Section 1. In the event that a dispute or grievance over the interpretation of this Agreement (other than jurisdictional) occurs, the following procedure shall be followed" . . . .

VIII

The issue tendered does not involve the interpretation of the agreement, but is an attempt to submit to arbitrators the legal question of the validity of Article XII, rather than its interpretation and there is no agreement to arbitrate such an issue.

IX

The American Arbitration Association has indicated its willingness, without being named a party to this action, to abide by any order made by the court.

X

The American Arbitration Association, at the instance of defendant, and over the objection of plaintiff has announced that it will proceed to arbitrate the issue unless directed otherwise by court order.

XI

If plaintiff is forced to submit this issue to arbitration then negotiation

procedures agreed to by defendant will be bypassed.

XII

The American Arbitration Association is not a proper forum by agreement or otherwise to arbitrate the issue tendered or any issue other than interpretation, and no question of interpretation is presented.

WHEREFORE, plaintiff prays:

1. That the court determine and declare that the American Arbitration Association has no jurisdiction to arbitrate the matter now tendered.

2. That the court further determine and declare that Article XII of the agreement is not a part of the contract, and is inoperative and void in its entirety.

3. That the court restrain the defendant from causing the American Arbitration Association to force plaintiff into arbitration of the issue now tendered.

4. That a temporary restraining order and a temporary injunction be issued during the pendency of this action restraining defendant from prosecuting the arbitration until this matter shall have been determined by the court.

5. That the plaintiff recover its costs and disbursement incurred herein.

DATED this 4th day of October, 1976.

LYCETTE, DIAMOND & SYLVESTER

By s/_____
Lyle L. Iversen
Attorneys for Plaintiff

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

EDWARD DEAN, being first duly sworn, on oath, deposes and says:

That I am President of SWANSON-DEAN CORPORATION, the above named plaintiff, that I have read the foregoing complaint, know the contents thereof, and believe the same to be true.

s/
EDWARD DEAN

SUBSCRIBED AND SWORN TO BEFORE me this 4th day of October, 1976.

s/Joan L. Wrann
NOTARY PUBLIC in and for the State of Washington, residing at Seattle

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SWANSON-DEAN CORPORATION, Plaintiff, vs. SEATTLE DISTRICT COUNCIL OF CARPENTERS, Defendant.	NO. C76-707 ANSWER AND COUNTERCLAIM

The defendant Seattle District Council of Carpenters answers plaintiff's complaint as follows:

I.

Defendant admits the allegations contained in Paragraph I.

II.

Defendant admits the allegations contained in Paragraph II.

III.

Defendant admits the allegations contained in Paragraph III.

IV.

With reference to the allegations contained in Paragraph IV of plaintiff's complaint, defendant admits the agreement contains Article XII Section 1 and Article XIII as set forth and denies all other allegations contained in Paragraph IV. Defendant also affirmatively states that Article XII of the agreement contains Section 2 omitted from plaintiff's allegations which reads as follows:

> It is the intent of Article XII, Section 1 to assure the contributions of fringe benefits to the applicable Trust by the subcontractor. The parties mutually agree that the said Article XII is to be interpreted and construed to effectuate this purpose.

V.

Defendant admits the allegations contained in Paragraph V.

VI.

Defendant admits the allegations contained in Paragraph VI.

VII.

Defendant admits the allegations contained in Paragraph VII.

VIII.

Defendant denies the allegations contained in Paragraph VIII.

IX.

Defendant admits the allegations contained in Paragraph IX.

X.

Defendant admits the allegations contained in Paragraph X.

XI.

Defendant denies the allegations contained in Paragraph XI and affirmatively states that any claims which are sought to be arbitrated arose prior to the agreement to negotiate a "substitute subcontractor clause Article XII".

XII.

Defendant denies the allegations contained in Paragraph XII.

ADDITIONAL DEFENSES

First Defense

Plaintiff has failed to state a claim upon which relief may be granted.

Second Defense

1. The collective bargaining agreement which underlies this dispute is between five separate employer associations consisting of numerous individual employers and five separate district councils of the United Brotherhood of Carpenters and Joiners of America which represent numerous individual local unions and three additional local unions.

2. All of the above referenced entities by virtue of their execution of the collective bargaining agreement are indispensable parties to this action under FRCP 19 which plaintiff has failed to join as required.

Third Defense

A prior arbitration and award between the parties to the collective bargaining agreement has resolved the dispute and binds the parties in this action.

Fourth Defense

The conduct alleged in the plaintiff's complaint is conduct which is arguably protected or prohibited by the National Labor Relations Act 29 USC §§ 151 - 168 and this court lacks subject matter jurisdiction over the same.

WHEREFORE, defendant prays that plaintiff's claim be dismissed with prejudice and costs and attorneys fees be awarded defendant.

COUNTERCLAIM

By way of further answer and counterclaim, the defendant alleges:

I.

Plaintiff is and at all times material hereto was a corporation engaged in interstate commerce within the meaning of 29 USC 152 and 185.

II.

The defendant is a labor organization engaged in representing employees in an industry affecting commerce as defined in 29 USC 152 and 185. The court has jurisdiction over this action under 29 USC 185; § 301 of the Taft-Hartley Act as amended.

III.

A collective bargaining agreement exists between the United Brotherhood of Carpenters and Joiners of America and the home building industry. Defendant is a member of the United Brotherhood of Carpenters and Joiners of America and plaintiff is a member of the home building industry and both are parties to the collective bargaining agreement.

IV.

The collective bargaining agreement provides for arbitration of ". . .a dispute or grievance over the interpretation of this Agreement. . . "

V.

A grievance has been filed and an arbitration commenced pursuant to the rules of the American Arbitration Association.

VI.

The plaintiff has refused and continues to refuse to be bound or to participate in the arbitration.

WHEREFORE, the plaintiff has breached the collective bargaining agreement and defendant prays that:

1. The court order the plaintiff to agree to arbitrate the dispute and be bound thereby.

2. Defendant be awarded its costs and attorneys fees.

3. Defendant be granted any other relief deemed equitable by the court.

DATED this 1 day of November, 1976.

VANCE, DAVIES, ROBERTS
REID & ANDERSON

By: s/
Russell J. Reid

By: s/
Herman L. Wacker

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE DISTRICT COUNCIL OF CARPENTERS, Plaintiff, vs. SWANSON-DEAN CORPORATION, Defendant.	)	NO. C77-298M COMPLAINT

The Plaintiff alleges:

I.

Defendant is and at all times material hereto was a corporation engaged in interstate commerce within the meaning of 29 U.S.C. § 152 and 185.

II.

The Plaintiff is a labor organization engaged in representing employees in an industry affecting commerce as defined in 29 U.S.C. §§ 152 and 185. The Court has jurisdiction over this action under 29 U.S.C. § 185, § 301 of the Taft-Hartley Act as amended.

III.

A collective bargaining agreement exists between the United Brotherhood of Carpenters and Joiners of America and the home building industry. Plaintiff is a member of the United Brotherhood of Carpenters and Joiners of America and Defendant is a member of the home building industry and both are parties to the collective bargaining agreement.

IV.

The collective bargaining agreement provides for arbitration of " . . . a dispute or grievance over the interpretation of this Agreement. . . ."

V.

A grievance was filed and an arbitration held pursuant to the rules of the American Arbitration Association.

VI.

The parties participated in arbitration of the dispute before Arbitrator Paul

D. Jackson under the auspices of the American Arbitration Association on January 17, 1977.

VII.

The arbitrator rendered a written award on February 23, 1977.

VIII.

The Defendant herein has refused and continues to refuse to comply with said award.

WHEREFORE, Defendant has breached the collective bargaining agreement and the Plaintiff prays that:

1. The Court order the Defendant to comply with said arbitration award in all respects.

2. The Court appoint a special master to supervise enforcement of the award and determination of the amount due the Plaintiff under the terms of such award.

3. The Court award Plaintiff judgment in the amount due Plaintiff under the award as well as costs and attorneys' fees.

4. The Plaintiff be granted any other relief deemed equitable by the Court.

DATED this 22 day of April, 1977.

VANCE, DAVIES, ROBERTS
REID & ANDERSON

By s/_____
HERMAN L. WACKER
Of Attorneys for Plaintiff

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE DISTRICT COUNCIL OF CARPENTERS, Plaintiff, vs. SWANSON-DEAN CORPORATION, Defendant.	)	CIVIL ACTION FILE NO. C77-298M ANSWER

Defendant answers the Complaint herein as follows:

1. Swanson-Dean Corporation, as a member of Seattle Master Builders Association, was a party to a collective bargaining agreement between the Home Building Industry and United Brotherhood of Carpenters and Joiners of America entered into June 24, 1974. Article XII of that Agreement violates the antitrust laws and is void and unenforceable.

2. Plaintiff sought to enforce the void provisions of Article XII of the Agreement by demanding arbitration to

require payment by defendant of fringe payments on the payrolls of non-union subcontractors, whereas by the terms of the Agreement, Article IX, failure of an employer to make wage or other negotiated fringe payments is not subject to the grievances or arbitration provisions of the contract.

3. Plaintiff further sought by arbitration proceedings to validate the illegal provisions of the contract and to have an arbitrator determine the question of whether antitrust laws have been complied with, all of which was contrary to law and public policy and was not within the scope of anything which defendant had agreed to submit to arbitration.

4. Plaintiff's demand for arbitration did not tender any issue of interpretation but involved only an issue of validity of the contract and no agreement existed

between plaintiff and defendant to submit such matters to arbitration.

5. Defendant refused to submit the matter to arbitration and advised the Arbitrator that it would not be bound by any decision of the Arbitrator and has refused and does refuse to accept the jurisdiction of the Arbitrator and denies that the arbitration has any binding effect.

6. There is no contractual obligation on the part of defendant to pay any contributions on the wages of employees of its independent subcontractor and the purported decision of the Arbitrator seeks to impose a liability not contained in the contract.

7. Plaintiff has no beneficial interest or enforceable right in contributions which it seeks to enforce for the Carpenters' Trust, nor can its members derive any benefits from contributions made on the wages of non-union independent

contractors; and the Carpenters' Trust is not a party to this action and is not seeking to enforce payment of contributions by this defendant as called for in the purported decision of the Arbitrator.

8. Even if Article XII of the contract was valid, plaintiff has suffered no monetary loss for which it is entitled to any damages and it has no pecuniary interest in the enforcement of the purported decision of the Arbitrator.

9. The trust agreement to which contributions are sought to be made specifically excludes contributions to be made by an employer on the employees of another employer and therefore bars contributions of the type sought to be exacted from defendant based upon the payrolls of subcontractors who are independent employers not in contractual relationship with plaintiff union.

10. Except as specifically admitted herein, defendant denies each and every allegation of the Complaint.

WHEREFORE, defendant prays that the above entitled action be dismissed with prejudice and that it recover its costs and disbursements incurred herein.

DATED this 9th day of May, 1977.

LYCETTE, DIAMOND & SYLVESTER
Attorneys for Defendant

By s/
Lyle L. Iversen